(14)

Supreme Court, U.S.
FILED
SEP 5 2002
CLERK

No. 01-1444

IN THE

Supreme Court of the United States

BEN CHAVEZ,
Petitioner,

vs.

OLIVERIO MARTINEZ,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE 50 CALIFORNIA CITIES IN SUPPORT OF PETITIONER AND REVERSAL

GIRARD FISHER
Counsel of Record

POLLAK, VIDA & FISHER

1801 Century Park East, 26th Floor
Los Angeles, California 90067
(310) 551-3400

Attorneys for Amici Curiae
50 CALIFORNIA CITIES

Lawyers Brief Service • Appellate Brief Printers • (213) 613-1013 • (949) 720-1510

41pp

No. 01-1444

In The
SUPREME COURT OF THE UNITED STATES
September 5, 2002

BEN CHAVEZ,

Petitioner,

vs.

OLIVERIO MARTINEZ,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE 50 CALIFORNIA CITIES IN FAVOR OF PETITIONER AND REVERSAL

THE AMICI CURIAE 50 CALIFORNIA CITIES

The 50 California Cities, as political subdivisons of a state, file their amici curiae brief without consent or motion pursuant to this Court's Rule 37.4. These are the Cities of:

ALAMEDA	MOUNTAIN VIEW
ALBANY	NATIONAL CITY
AVALON	NOVATO
BAKERSFIELD	ORANGE
BRISBANE	ORINDA
BURBANK	PALM DESERT
CAPITOLA	PALM SPRINGS
CHINO	PIEDMONT
CHULA VISTA	PLEASANT HILL
COACHELLA	REDONDO BEACH
CORTE MADERA	ROSS
COTATI	SACRAMENTO
CULVER CITY	SAN ANSELMO
DEL REY OAKS	SAN DIMAS
DINUBA	SAN LUIS OBISPO
HAYWARD	SAN PABLO
HOLLISTER	SANTA CRUZ
INGLEWOOD	SANTA ROSA
IRWINDALE	SIGNAL HILL
LAGUNA BEACH	SUNNYVALE
LAKEWOOD	SUTTER CREEK
LODI	TIBURON
LYNWOOD	WALNUT
MARINA	WESTMORLAND
MONTEREY	YREKA

QUESTIONS PRESENTED

1. Whether a police office who takes an involuntary statement from a criminal suspect can be held liable to the suspect under Title 42 U.S.C. section 1983 for a violation of the Fifth Amendment, or under Fourteenth Amendment "involuntariness" jurisprudence, when the suspect is not criminally prosecuted.

2. Whether, in the same circumstances, the officer can be held liable to the suspect under section 1983 for a violation of Fourteenth Amendment substantive due process if the officer did not intend to harm the suspect, did not physically or mentally harm him, and had a legitimate reason for questioning him.

TABLE OF CONTENTS

Page #

The Amici Curiae 50 California Cities ii

Questions Presented iii

Table of Authorities vi

INTEREST OF THE AMICI CURIAE 1

THE SCOPE OF REVIEW 1

SUMMARY OF ARGUMENT 1

FACTS IN BRIEF 2

PROCEDURAL HISTORY 3

ARGUMENT 7

The Fifth Amendment Attaches Only When Incriminating Statements Are Introduced at Trial 7

The Fourteenth Amendment "Involuntariness" Jurisprudence Should Not Be Confused with "Substantive Due Process" 17

The Taking of an Involuntary Statement Violates Substantive Due Process Only If Police Tactics "Shock the Conscience" and Serve No Legitimate State Interest 21

CONCLUSION 29

Appendix "A" 30

TABLE OF AUTHORITIES

Page #

CASES

Abeyta v. Chama Valley Independent Sch. Dist.
77 F.3d 1253 (10th Cir. 1996) 26

Bell v. Wolfish
441 U.S. 520 (1979) 26

Bennett v. Passic
545 F.2d 1260 (10th Cir. 1976) 16

Brown v. Mississippi
297 U.S. 278 (1936) 19

California Attorneys for Criminal Justice v. Butts
195 F.3d 1039 (9th Cir. 1999) 5, 17, 20, 21, 22, 29

Collins v. Harker Heights
503 U.S. 115 (1992) 26

Collins v. Nuzzo
244 F.3d 246 (1st Cir. 2001) 23

Colorado v. Connelly
479 U.S. 157 (1986) 14, 18

Cooper v. Dupnik
963 F.2d 1220 (9th Cir. 1992) 5, 16-22, 28, 29

Page #

Cruz-Erozo v. Rivera-Montanez
212 F.3d 617 (1st Cir. 2000) 21, 26

DeShawn v. Safir
156 F.3d 340 (2nd Cir. 1998) 15, 18, 21

Dickerson v. United States
530 U.S. 428 (2000) 8, 12, 13, 19

Galland v. City of Clovis
24 Cal. 4th 1003, 16 P.3d 130,
103 Cal. Rptr. 2d 711 (2001) 24, 25

Gardner v. Broderick
392 U.S. 273 (1968) 14

Garrity v. New Jersey
385 U.S. 493 (1967) 14

Guiffre v. Bissell
31 F.3d 1241 (3rd Cir. 1994) 15

Jackson v. Denno
378 U.S. 368 (1964) 17

Jones v. Cannon
174 F.3d 1271 (11th Cir. 1999) 17

Kastigar v. United States
406 U.S. 441 ..... 6, 8, 13, 14

Leftkowitz v. Cunningham
431 U.S. 801 (1977) 14

Page #

Lewis v. County of Sacramento
523 U.S. 833 (1998) 1, 22, 23

Lisenba v. California
314 U.S. 219 (1941) 18

Malinski v. New York
324 U.S. 401 (1945) 18

Malloy v. Hogan
378 U.S. 1 (1964) 18, 20

Martinez v. City of Oxnard
963 F.3d at 1248 ..... 5, 6, 7, 18, 20, 21, 29

Mincey v. Arizona
437 U.S. 385 (1978) 4, 18, 19

Miranda v. Arizona
386 U.S. 436 (1966) 5, 12, 13, 14, 17, 20, 22

New York v. Quarles
467 U.S. 649 (1984) 8

Oregon v. Elstad
470 U.S. 298 (1985) 8, 14

PFZ Properties, Inc. v. Rodriguez
928 F.2d 28 23

Riley v. Dorton
115 F.3d 1159 (7th Cir. 1997) 16, 26

Page #

Rochin v. California
342 U.S. 165 (1952) 15, 19, 22

Schnecklothe v. Bustamonte
412 U.S. 218 (1973) 14

Scott v. United States
430 U.S. 128 (1978) 17, 25

United States v. Calandra
414 U.S. 338 (1974) 8

United States v. Verdugo-Urquidez
494 U.S. 259 (1990) 8

Warren v. City of Lincoln
864 F.2d 1436 (8th Cir. 1989) 16

Whren v. United States
517 U.S. 806 (1996) 25

Wilkins v. May
872 F.2d 190 (5th Cir. 1989) 16

Williams v. United States
341 U.S. 97 (1951) 20

Withrow v. Williams
507 U.S. 680 (1993) 8

Wolffe v. McDonnell
418 U.S. 539 23

STATUES AND RULES

42 U.S.C. section 1983 ..... iii, 1, 2, 3, 13, 18, 19, 20

Criminal Code [now Title 18 U.S.C. 242] 19

Title 42 U.S.C. section 1983 ..... iv, 2, 3, 4, 14, 19, 20

Rule 37.4 iii

OTHER AUTHORITIES

Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 Mich. L. Rev. 2625, 2653 (1996) 10, 11

Steven D. Clymer, *Are Police Free to Disregard Miranda,* 112 Yale L.J. ___, ___ (forthcoming December 2002) (Section I.A.2) 13, 14

William W. Hening, *The New Virginia Justice, Compromising the Office and Authority of a Justice of the Peace* 132 (Richmond, Va. To Nicolson 1975) 11

Moglen, *Taking the Fifth: Reconstructing the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 Mich. L. Rev. 1086, 1112 (1994) 9, 10

United States Congress, Debates and Proceedings in the Congress of the United States 434 (Washington D.C. 1834) 9, 10

INTEREST OF THE AMICI CURIAE

The Court's decision will affect the ability of local law enforcement authorities to gather information for crime investigation, witness protection, internal review, and other legitimate state purposes.

THE SCOPE OF REVIEW

Amici Curiae request this court to address, not just the qualified immunity, but also the validity of the respondent's underlying Fifth and Fourteenth Amendment claims. This Court can and should undertake that inquiry. "[I]n any action under [Title 42 U.S.C. section 1983], the first step is to identify the exact contours of the underlying right said to have been violated."[1] Here that step would enable this Court to clarify fundamental questions about whether police officers may be held liable under the Fifth and Fourteenth Amendments for taking involuntary statements from criminal suspects. This brief focuses on fundamental questions rather than the qualified immunity.

SUMMARY OF ARGUMENT

The Fifth Amendment does not prohibit police from taking an involuntary statement from a suspect before criminal proceedings are initiated against him. The text of the Amendment, its history, and the decisions of this Court establish that government can violate the Fifth Amendment only at the time of trial.

The Fourteenth Amendment due process protection against involuntary statements likewise attaches only at the time of trial. A bulwark against self-incrimination fashioned

---

[1] *Lewis v. County of Sacramento,* 523 U.S. 833, 840 n.5 (1998).

before this Court applied the Fifth Amendment to states, "involuntary" jurisprudence should not be expanded beyond the scope of the Fifth Amendment itself.

The damages remedy under Title 42 U.S.C. section 1983 for a violation of Fourteenth Amendment substantive due process should apply only when police interrogation tactics "shock the conscience."

Thus, there is a range of police interrogation tactics that entitles a criminal suspect to invoke the Fifth Amendment privilege at trial, but not the section 1983 damages remedy if they do not "shock the conscience." Petitioner Chavez's conduct falls within that permissible range. As explained in the last section of this brief, it is important to acknowledge the existence of that range, because the taking of involuntary statements often serves legitimate state interests without violating suspects' constitutional rights.

FACTS IN BRIEF

These facts, derived from the District Court's Order,[2] are offered to place the Amici Curiae's arguments in context. Amici Curiae defer to the Brief for the Petitioner for a more detailed statement.

During a scuffle with two police officers, Respondent Martinez allegedly grabbed the gun of one and pointed it in a threatening manner at both. The other officer shot Martinez in the temple, abdomen and knee.

After Martinez was taken to the hospital, Petitioner

---

[2] Order Granting in Part and Denying in Part Plaintiff's Motion for Summary Adjudication ("Order"), entered August 2, 2000.

Chavez, also a police officer, questioned Martinez while hospital personnel treated him and prepared him for surgery. Chavez tape-recorded the questioning intermittently over a period of 45 minutes. Because of interruptions for medical treatment, the actual questioning spanned 10 minutes. On tape, Martinez admitted grabbing the gun and pointing it at the officers.

Chavez did not give Martinez the *Miranda* warnings before questioning him. Chavez persisted in the questioning even though Martinez twice asked him to stop. Martinez, yelling in pain and drifting in and out of consciousness, repeatedly told Chavez that he was dying and did not want to talk.

Martinez was never prosecuted for a crime in connection with this incident.

PROCEDURAL HISTORY

The District Court Proceedings

Respondent Martinez filed a complaint in the District Court against Petitioner Chavez and others. The operative First Amended Complaint alleges, among other things, that Martinez is entitled to damages under Title 42 U.S.C. section 1983 based on the theory that Chavez's interrogation violated Martinez's Fifth and Fourteenth Amendments rights. Although alleging that Martinez's statement was extracted involuntarily, the First Amended Complaint alleges only one kind of damage that resulted from the interrogation: "interfer[ence] with [Martinez's] right to receive medical care and treatment."[3]

---

[3] *Id.* at para. 17, p. 6, ll. 22-23.

Martinez moved for summary adjudication on his Fifth and Fourteenth Amendment claims; and Chavez filed a cross-motion for summary adjudication on his qualified immunity defense. The District Court, finding the facts "remarkably similar to those in *Mincey*,"[4] held that:

> "plaintiff's statement was coerced in clear violation of his constitutional rights. Accordingly, plaintiff is entitled to summary adjudication of his claims for violations of the Fifth and Fourteenth Amendments."[5]

At the same time, the District Court denied Chavez's motion for summary adjudication on the ground of qualified immunity. On that defense, the court emphasized that "the law against coerced confessions was clearly established at the time of [respondent's] interview" and that "given the circumstances of the interview and established constitutional boundaries, respondent was not entitled to qualified immunity."[6]

The Circuit Court of Appeals Proceedings

Chavez took an interlocutory appeal from the District Court's denial of his motion for summary adjudication on qualified immunity. The Ninth Circuit affirmed, holding that "Chavez violated the Fourth and Fifth Amendments by subjecting Martinez to a coercive, custodial interrogation while he received treatment for life threatening gunshot

---

4 *Mincey v. Arizona*, 437 U.S. 385 (1978).

5 Order, *supra*, pp. 7-8.

6 *Id.* at p. 13.

wounds inflicted by other police officers."[7] Following its earlier decisions in *Cooper*[8] and *Butts*,[9] the court held it did not matter that Chavez was never prosecuted. Positing that "the Fifth Amendment's purpose is to prevent coercive interrogation practices that are 'destructive of human dignity,'"[10] the court held that "[e]ven though Martinez's statements were not used against him in a criminal proceeding, Chavez's coercive questioning violated Martinez's Fifth Amendment rights," and likewise his Fourteenth Amendment rights.[11] The court concluded that in light of the "extreme circumstances of [the] case," a reasonable police officer in Chavez's position could not have believed that the interrogation of Martinez comported with the Fifth and Fourteenth Amendments. On that basis, the court held that the qualified immunity was not available to Chavez.[12]

What The District Court and Court of Appeals Did *Not* Find

The District Court's order and Court of Appeal's decision are noteworthy for what they did *not* find. Neither court

---

7 *Martinez v. City of Oxnard*, 270 F.3d 852, 856 (9th Cir. 2001).

8 *Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992).

9 *Butts v. California Attorneys for Criminal Justice*, 195 F.3d 1039 (9th Cir. 1999).

10 *Martinez v. City of Oxnard, supra*, 270 F.3d at 857, quoting *Cooper, supra*, 963 F.2d at 1239 and (in internal quotes) *Miranda v. Arizona*, 386 U.S. 436, 457-58 (1966).

11 *Martinez v. City of Oxnard, supra*, 270 F.3d at 857.

12 *Id.* at 859.

found that Chavez's interrogation tactics "shock the conscience" or amounted to a "deliberate indifference" to Martinez's well-being. Neither found that Chavez denied or interfered with respondent's medical treatment – indeed the District Court found that there was insufficient evidence to establish that Chavez interfered with Martinez's medical treatment.[13] The District Court did not find that Chavez's interrogation was intended to cause severe emotional distress – or that Martinez did in fact suffer any such distress as the result of the interrogation. On this point the Court of Appeals merely speculated that, even though Martinez was never prosecuted, a person in Martinez's position could reasonably believe that his statements might be used in a criminal prosecution or lead to other evidence that might be used against him.[14]

Finally, neither court evaluated whether there was a legitimate state interest in pressing ahead with Martinez's questioning at the hospital, although the District Court noted that both Chavez and Martinez may have been under the impression that Martinez was dying; and that Chavez wanted to obtain information about his fellow officers' possible culpability for the shooting.[15]

---

[13] Order, *supra,* at p. 8.

[14] *Martinez v. City of Oxnard, supra,* 270 F.3d at 857 (citing *Miranda, supra,* 484 U.S. at 1243, and *Kastigar v. United States,* 406 U.S. 441, 445 (1972).

[15] Order, *supra,* p. 13.

ARGUMENT

The Fifth Amendment Attaches Only When Incriminating Statements Are Introduced at Trial

The Fifth Amendment of the United States Constitution provides that "[n]o person . . . shall be compelled *in any criminal case* to be a witness against himself." (Emphasis added.) The text plainly means that a criminal defendant may invoke a privilege against self incrimination in the course of a trial. But there are no textual or historical reasons that lead one to conclude that the drafters meant more, and that they intended the Fifth Amendment to prohibit government from taking an involuntary statement from a suspect before criminal proceedings are initiated against him.

The Text

There is no such text – an interrogation of a suspect before initiation of criminal proceedings is not part of the "case." One need only compare the words of the Fourth and Fifth Amendments to see that the Bill of Rights treats other investigatory intrusions differently from the privilege against giving testimony against oneself. The Fourth, acknowledging that criminal investigations involve matters of degree, proscribes only "unreasonable" searches – whether before or during the "case"; whereas the Fifth declares an absolute prohibition against taking testimonial evidence from the accused in the limited circumstance of a "case."

Reasonableness is a logical guiding principle for criminal investigations; but when the Fourth and Fifth Amendments are read together, the absolute prohibition of the Fifth makes sense only as a protection accorded to a defendant at trial. Had the drafters also intended to prohibit the taking of

involuntary statements from suspects in custody, presumably they would have done so in the same way that they regulated the taking of physical and documentary evidence: broadly to cover all circumstances under a "reasonableness" standard as in the Fourth; not narrowly as a absolute prohibition in the Fifth. Any other interpretation renders the phrase "in any criminal case" meaningless.

Consistent with the above, this Court has previously "recognize[d] that unreasonable searches under the Fourth Amendment are different from unwanted interrogation under the Fifth Amendment,"[16] and that the Fifth Amendment's "strictures, unlike the Fourth's are not removed by a showing of reasonableness."[17] Further, this Court has assumed, without explicitly deciding, that a constitutional violation of the Fifth occurs only at trial; whereas a violation of the Fourth is "fully accomplished" at the time of an unreasonable governmental intrusion.[18] Unlike the Fourth Amendment, the Fifth Amendment provides a fundamental *trial* right.[19]

The Historical Background

There are no historical underpinnings for a theory that the drafters of the Bill of Rights intended to prohibit government

---

[16] *Dickerson v. United States*, 530 U.S. 428, 441 (2000), citing *Oregon v. Elstad*, 470 U.S. 298, 306 (1985).

[17] *New York v. Quarles*, 467 U.S. 649, 653 n.3 (1984).

[18] *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990), citing *Kastigar v. United States*, *supra*, 406 U.S. at 453 as to the Fifth Amendment, and quoting *United States v. Calandra*, 414 U.S. 338, 354 (1974) as to the Fourth Amendment.

[19] *Withrow v. Williams*, 507 U.S. 680, 691 (1993).

from taking involuntary statements from criminal suspects. Colonial Americans did not recognize a free-standing "human right" against self-incrimination.[20] Protection against coerced confessions existed primarily to safeguard a liberty of more pressing importance – the right to a fair jury trial.[21] In that vein, colonial provisions against coercive self-incrimination sought not to expand, but merely to preserve values embedded in the English common law.[22] James Madison's original draft of the Bill of Rights may have implied a more all-encompassing protection: "No person . . . shall be compelled to be a witness against himself."[23] Significantly, however, the phrase was objected to as a "general declaration in some degree contrary to laws passed" in the First Congress, and the narrowing language "in a criminal case" was added.

The limitations imposed by Congress suggest that the purpose of Fifth Amendment was to safeguard the truth-seeking function of the jury trial, not to regulate pretrial interrogation of criminal suspects. The obvious inference is that police compulsion does not violate the Amendment unless compelled statements are brought before the jury. Commentators acknowledged the exclusionary nature of the rule as early as 1819: "No man shall be compelled to give evidence against himself. Hence it is held that if a criminal be sworn to his incrimination taken before a justice, *it shall not*

---

[20] *See* Moglen, *Taking the Fifth: Reconstructing the Origins of the Constitutional Privelege Against Self-Incrimination*, 92 Mich. L. Rev. 1086, 1112 (1994).

[21] *Id.* at 1113.

[22] *Id.* at 1121.

[23] United States Congress, Debates and Proceedings in the Congress of the United States 434 (Washington D.C. 1834).

be read against him."[24]

Recent scholarship demonstrates that the Fifth Amendment afforded no protection against the taking of the unsworn statement itself. At the time the states adopted the Bill of Rights, routine criminal process required justices of the peace to take unsworn statements from criminal suspects. As the study by Eben Moglen concludes:

> "American criminal procedure in the colonial period, like the English model it closely followed, assumed the testimonial availability of the defendant at the crucial pretrial stage of the prosecution and freely made use of the defendant's admissions at trial."[25]

And as explained by Albert W. Alschuler:

> "What the Fifth Amendment privilege did not prohibit is in fact clearer than what it did. The privilege did not prohibit the forceful incriminating interrogation of suspects by judges and magistrates so long as the suspects remained unsworn."[26]

Those interrogations served as the basis for the summary disposition of lesser offenses and as evidence in criminal trials. That procedure endured well into the Nineteenth Century; and neither the courts nor practitioners regarded it as

---

[24] Moglen, *supra,* at 1128, quoting William W. Hening, *The New Virginia Justice, Compromising the Office and Authority of a Justice of the Peace* 132 (Richmond, Va. T. Nicolson 1795). (Emphasis added.)

[25] *Id.* at 1129.

[26] Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 Mich. L. Rev. 2625, 2653 (1996).

violating the Fifth Amendment prohibition against compelled testimony – the reason being that only *sworn* testimony fell within the concept of undue coercion.[27]

This historical background shows that the drafters of the Bill of Rights could not have intended the Fifth Amendment to prohibit the taking of the unsworn testimony from a criminal suspect. "A more promising hypothesis is that the Framers saw no tension between their courtroom procedures [allowing the use of unsworn statements] and the principles that they declared in the Constitution."[28]

The historical background suggests that today there is a gap in the protections afforded by the Fourth and Fifth Amendments that the drafters of the Bill of Rights did not perceive. That gap is the lack of an explicit standard applicable to statements taken from a criminal suspect *before* the institution of criminal proceedings. That gap exists because for a considerable period of time – spanning the colonial period, the drafting of the Bill of Rights, and early Nineteenth Century criminal procedure – unsworn statements, even if resulting from forceful interrogation, were not considered to be the result of unacceptable compulsion.

Should this Court nonetheless assume that the absolute prohibitions of the Fifth Amendment logically extend to the taking of an involuntary statement from a criminal suspect before the initiation of criminal proceedings? Apart from the undesirability of writing new text into the Constitution, the differences between the Fourth and Fifth Amendments demonstrate that such an extension of the Fifth Amendment

---

[27] *Id.* at 2659-2660.

[28] *Id.* at 2657.

would be seriously mistaken. As already discussed, when the drafters clearly addressed procedures that might occur *before* the initiation of criminal proceedings – *i.e.* searches – they imposed a "reasonableness" standard. If inclined to indulge in extrapolations about how the drafters would have approached the question of interrogations of criminal suspects, one must conclude that the Fourth Amendment provides better clues than the Fifth.

The Miranda Rules Pertain Only to the Admissibility of Evidence

In *Miranda*, this Court summarized its holding as follows:

> "Our holding will be spelled out with some specificity in the pages which follow but briefly stated it is this: the prosecution may not *use* statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the *defendant* unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.[29]

In the sentences that followed, this Court succinctly outlined the familiar *Miranda* warnings and rules.

None of the *Miranda* warnings or rules purport to be constitutional rights in and of themselves. Although this Court recently held that they are constitutionally based,[30]

---

29 *Miranda v. Arizona,* 384 U.S. 436, 444. (Emphasis added.)

30 *Dickerson v. United States, supra,* 530 U.S. 428.

those warnings and rules are prophylatic only. They are intended to protect criminal *defendants* from the *use* of their incriminating statements, because that is all that the Fifth Amendment prohibits. In *Dickerson,* this Court expressed reservations about its prior decision in *Miranda,* but deferred to precedent: "Whether or not we would agree with *Miranda*'s reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now.[31] Given those reservations, it would be strange indeed to hammer the shield of *Miranda* into a sword of a damages remedy on the anvil of Title 42 U.S.C. section 1983.

Legal Precedent Holds That The Fifth Amendment Does Not Bar Involuntary Statements

Although this Court has not squarely addressed whether police violate the Fifth Amendment when they compel an involuntary statement, it has decided that government may compel such statements in other contexts. For example, the "Immunity Doctrine" holds that the government can force witnesses to testify to self-incriminating acts as long as it grants them immunity.[32] Despite the protections of the Fifth Amendment, immunized witnesses who refuse to testify can be jailed.[33] The Immunity Doctrine clarifies that it is the *use* of compelled statements, as opposed to the compulsion itself, that violates the Fifth Amendment.

---

31 *Id.* at 444.

32 *See Kastigar v. United States, supra,* 406 U.S. 441.

33 Steven D. Clymer, *Are Police Free to Disregard Miranda,* 112 Yale L.J. ___, ___ (forthcoming December 2002) (Section I.A.2).

Similarly, the "Penalty Cases" demonstrate that the government may also use economic sanctions to compel witnesses to testify to potentially self-incriminating acts.[34] Thus, government may lawfully fire employees for refusing to answer incriminating questions about their official duties.[35]

The overwhelming majority of Circuit Courts of Appeal have applied this principle[36] to police interrogations:

---

[34] *Id.* at ___ (section I.A.3).

[35] *Leftkowitz v. Cunningham*, 431 U.S. 801, 806 (1977); *Gardner v. Broderick*, 392 U.S. 273, 278 (1968).

[36] Announcing a single "principle" is an oversimplification, because the courts have addressed four different circumstances in which an involuntary statement may have been taken. In ascending order of coercive pressure, they are:

1. *Failure to Mirandize*: Police fail to give the *Miranda* warning to a suspect before taking a statement, but do not exert physical or psychological pressure to make him speak. An irrebuttable presumption of compulsion for purposes of admission of evidence arises. *See Oregon v. Elstad, supra*, 470 U.S. 298.

2. *Compelled Statement*: Government forces potential witness to speak by threatening contempt of court or job termination. *See* the "Immunity" and "Penalty Cases" discussed in the text. Courts use a categorical approach to determine whether the statement was compelled, focusing on the nature of the official pressure generally. *See* Clymer, *supra* note 17, at section III.B.1; *Garrity v. New Jersey*, 385 U.S. 493 (1967).

3. *Coerced Statement*: Police unlawfully exert pressure on a suspect to such a degree that his will is overborne. *Colorado v. Connelly*, 479 U.S. 157 (1986). Courts use a case by case approach when determining if coercion was used, taking into account the totality of all the surrounding circumstances. *Schnecklothe v. Bustamonte*, 412 U.S. 218 (1973).

4. *"Shock the Conscience"*: Police methods to obtain evidence from the suspect are so extreme that they "offend those canons of decency and fairness which express the notions of justice." *Rochin v. California*, 342 U.S. 165, 169 (1952).

Appendix "A" shows the position of this Court and the Circuit Courts of Appeals on whether any of these four levels of involuntary statements violates the Fifth or Fourteenth Amendments. The decisions cited in notes 32, 35 and 37-43 are the basis for the Appendix.

The Second Circuit:

> "Even if it can be shown that a statement was obtained by coercion, there can be no Fifth Amendment violation until that statement is introduced against the defendant in a criminal proceeding."[37]

The Third Circuit:

> The Ninth Circuit *Cooper* decision broke new ground when it held that substantive violation of Fifth Amendment rights could occur absent use of statements against defendant. Thus, interrogating officers are entitled to qualified immunity.[38]

The Fourth Circuit:

> "Most courts refuse to find a Fifth Amendment violation even where statements were made, but were not actually used in a

---

[37] *DeShawn v. Safir*, 156 F.3d 340, 346-37 (2nd Cir. 1998).

[38] *Guiffre v. Bissell*, 31 F.3d 1241, 1256 (3rd Cir. 1994).

criminal proceeding."[39]

The Seventh Circuit:

> "The Fifth Amendment does not forbid the forcible extraction of information but only the use of information so extracted as evidence in a criminal case."[40]

The Eighth Circuit:

> "Remedy for a *Miranda* violation is the exclusion fr >m evidence of any compelled self-incrimination, not a section 1983 action."[41]

The Tenth Circuit:

> No rational argument can be made that failure to read *Miranda* rights triggers Sec. 1983 liability, where statements are not introduced at trial.[42]

The Eleventh Circuit:

> Continued interrogation after defendant requests an attorney does not create a cause of action for Section 1983 damages when statement is not used at trial; the

---

39 *Riley v. Dorton*, 115 F.3d 1159, 1164 (7th Cir. 1997).

40 *Wilkins v. May*, 872 F.2d 190, 194 (5th Cir. 1989).

41 *Warren v. City of Lincoln*, 864 F.2d 1436, 1442 (8th Cir. 1989).

42 *Bennett v. Passic*, 545 F.2d 1260, 1263 (10th Cir. 1976).

> *Cooper* majority departed from the clear requirements of Sec. 1983.[43]

The Ninth Circuit swims alone against this tide of legal authority in *Cooper*,[44] *Butts*,[45] and the decision now under review, *Martinez*.[46] For all the reasons stated above, the Ninth Circuit is wrong in holding that police can violate the Fifth Amendment during the interrogation of a criminal suspect. This Court should overrule the Ninth Circuit on this point.

The Fourteenth Amendment "Involuntariness" Jurisprudence Should Not Be Confused with "Substantive Due Process"

Cooper notes that the Due Process Clause of the Fourteenth Amendment protects against two types of self-incrimination.[47] One is the use of "involuntary" statements at the time of trial. The line of authority in support of this protection holds that any criminal trial use of defendant's involuntary statement is a denial of due process.[48] It applies the Due Process Clause to "prevent fundamental unfairness in

---

43 *Jones v. Cannon*, 174 F.3d 1271, 1290-91 (11th Cir. 1999).

44 *Cooper v. Dupnik*, *supra*, 963 F.2d 1220.

45 *California Attorneys for Criminal Justice v. Butts*, *supra*, 195 F.3d 1039.

46 *Martinez v. City of Oxnard*, *supra*, 270 F.3d 852.

47 963 F.2d at 1245, 1249.

48 *Jackson v. Denno*, 378 U.S. 368, 376 (1964).

the *use* of evidence, whether true or false."[49] "If all the attendant circumstances indicate that the confession was coerced or compelled, it may not be used to *convict* a defendant."[50] This line of authority defines an involuntary statement as one that results from "police overreaching"[51] or that is not a "product of a rational intellect and a free will."[52]

Until the Ninth Circuit's decision in *Cooper*, courts used "involuntariness" jurisprudence only to preclude use of involuntary statements *at trial*. No other Circuit has used this "involunariness" jurisprudence to fashion a damages remedy under Title 42 U.S.C. section 1983, although the Second Circuit suggested in *DeShawn* that such a remedy might exist if the taking of involuntary testimony "amounts to actual coercion based on outrageous government conduct."[53]

It is important to trace the provenance of this "traditional 'test of voluntariness.'"[54] It developed before this Court made the Fifth Amendment applicable to the states in *Malloy*.[55] In the absence of a Fifth Amendment protection against the admission of involuntary statements, this Court provided an

---

[49] *Lisenba v. California*, 314 U.S. 219, 236 (1941) (Emphasis added).

[50] *Malinski v. New York*, 324 U.S. 401, 404 (1945) (Emphasis added).

[51] *Colorado v. Connelly, supra*, 479 U.S. at 163-64.

[52] *Mincey v. Arizona, supra*, 437 U.S. at 398.

[53] *DeShawn v. Safir, supra*, 156 F.3d at 346-37.

[54] *Martinez v. City of Oxnard, supra*, 963 F.3d at 1248.

[55] *Malloy v. Hogan*, 378 U.S. 1 (1964).

equivalent protection through the Due Process Clause.[56] And as noted, like the Fifth Amendment, that protection attached *only* at the time of trial.

After *Malloy*, retention of "involuntariness" jurisprudence became optional. This Court observed that "[w]e have never abandoned this due process jurisprudence . . . but our decisions in *Malloy* and *Miranda* changed the focus of much of the inquiry [to the Fifth Amendment]."[57] Although "involuntariness" jurisprudence has not been abandoned, there is no reason to believe that it should be extended beyond the Fifth Amendment rule of exclusion to create a civil damages remedy under Title 42 U.S.C. section 1983 for a violation of the Fourteenth Amendment Due Process Clause. Only the Ninth Circuit assumes so.

The second type of due process violation occurs when government extracts evidence not only involuntarily, but in a manner that "shock[s] the conscience," including physical torture[58] and bodily intrusion.[59] Until *Cooper*, no case had found a defendant liable for *damages* under section 1983 for extracting testimony in a manner that "shock[s] the conscience," although in one case government agents were found criminally liable under section 20 of the Criminal Code [now Title 18 U.S.C. 242] – the criminal code analog of 42 U.S.C. section 1983 – for beating suspects to extract a

---

[56] See cases cited at notes 48-52.

[57] *Dickerson v. United States, supra*, 530 U.S. at 434.

[58] *Brown v. Mississippi*, 297 U.S. 278 (1936).

[59] *Rochin v. California, supra*, 342 U.S. 165.

confession.[60] There government agents engaged in a "brutal deprivation[] of constitutional rights."[61]

Certainly there is no principled objection to finding that a violation of due process occurs at the time an involuntary statement is *taken* if government's tactics in extracting the statement "shock the conscience." Indeed, the circumstances that the Second Circuit hypothesized in *DeShawn, supra*, would seem to fall within this category.

Cooper, however, found that the police officers' conduct in that case violated *both* the "involuntariness" jurisprudence and "shock the conscience" standards, and predicated civil liability on both. Assuming for the sake of argument that the Ninth Circuit correctly decided that the officers' aggressive interrogation of the "Prime Time Rapist" suspect "shock[s] the conscience," and that they could be held liable on that basis, it nevertheless erroneously assumed that they might also be held liable merely because they continued to interrogate the suspect after he had asked them to stop and to provide him with an opportunity to speak with his attorney. In that regard, the Ninth Circuit impermissibly confused the traditional "involuntariness" jurisprudence and the "shock the conscience" standard, with the end result that *both* have become independent bases for section 1983 liability in the Ninth Circuit. This confusion is of no small moment, because in *Butts*[62] and *Martinez*[63] there were no findings that the

---

[60] *Williams v. United States*, 341 U.S. 97 (1951).

[61] *Id.* at 104.

[62] *California Attorneys for Criminal Justice v. Butts, supra*, 195 F.3d 1039.

[63] *Martinez v. City of Oxnard, supra*, 270 F.3d 852.

police interrogations "shock the conscience."

The clear implication of *Cooper*, *Butts*, and *Martinez* is that police who elicit involuntary statements from criminal suspects *always* violate the Fifth and Fourteenth Amendments, regardless of whether the suspects are criminally prosecuted and regardless of the circumstances surrounding their interrogations. The chilling impact of such a rule on police investigations should be obvious. At a minimum, this Court should hold that no liability can arise merely as the result of taking a suspect's involuntary statement that is not offered as evidence of his guilt at trial. And, as argued in the next section, this Court should go a step further and acknowledge that there are many situations – including the Martinez shooting incident – where the state has a legitimate interest in obtaining an involuntary statement.

The Taking of an Involuntary Statement Violates Substantive Due Process Only If Police Tactics "Shock the Conscience" and Serve No Legitimate State Interest

There are two theories under which a plaintiff m[illegible]ring a substantive due process claim.[64] Under the first, [illegible] must demonstrate a deprivation of an identified liberty or property interest protected by the Fourteenth Amendment. The analysis in the preceding sections shows that, with respect to this theory, respondent Martinez has been pursuing a willow-the-wisp. There are no Fifth or Fourteenth Amendment guarantees against the taking of an involuntary statement. The *Miranda* "right to remain silent" is not a constitutional right, but only a prophylactic measure designed to protect the Fifth Amendment privilege in criminal trials. Yet it is on the

---

[64] *See Cruz-Erozo v. Rivera-Montanez*, 212 F.3d 617, 621-622 (1st Cir. 2000) for an articulation of these two theories followed here.

basis of a violation of this supposed "right" that the District Court and Circuit Court of Appeals erroneously based their decisions.

Under the second substantive due process theory, a plaintiff is not required to prove the deprivation of a specific liberty or property interest, but must prove that the state's conduct is arbitrary, oppressive, and harmful – generally measured by the "shock the conscience" standard.[65] The "shock the conscience" standard, however, is problematic. In announcing it, this Court acknowledged the difficulty of achieving an objective measure that avoids *ad hoc* decision-making.[66] Thus, the "shock the conscience" standard may be viewed as an effort to raise the bar of liability sufficiently high to avoid the charge that the due process clause is too "indefinite and vague"[67] for enforcement. To complicate the analysis, the standard may be "deliberate indifference" in some cases.[68] These problems lead litigants and courts to grapple with, not only the question of what standard applies in any given case, but also the meaning of the standard applied.

In approaching these problems, it may be useful to consider, not so much the standards or their definitions, but the factors that this court has considered in determining

---

[65] *Lewis v. County of Sacramento, supra*, 523 U.S. at 850 ("[D]eliberate indifference can rise to a constitutionally shocking level").

[66] *Rochin v. State of California, supra*, 342 U.S. at 171-172.

[67] *Id.* at 172.

[68] As this court observed in *Lewis v. County of Sacramento, supra*, 523 U.S. at 852, "deliberate indifference can rise to a constitutionally shocking level."

whether there has been a violation of substantive due process. These include the arbitrariness of the conduct; the intent to harm; the opportunity for deliberation; and the harm inflicted. Each of these factors might be viewed as a continuum, with conduct falling at one end tending to confirm liability, but at the other to negate it. If this approach is used, one must come to the conclusion that Chavez's conduct falls far below the level of culpability required for a substantive due process violation.

Arbitrariness: This court has emphasized that "the touchstone of due process is protection of the individual against arbitrary action of government."[69] Arbitrariness is one end of this continuum, while legitimate state interest is the other. With respect to the latter, this court has held that "conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscious shocking level."[70] In that connection, it is noteworthy that Chavez, a supervising officer, was attempting to investigate his subordinate officer's role in the Martinez shooting. The District Court described his motivation in negative terms: "[B]ecause this was an officer-involved shooting, Chavez was clearly trying to obtain information that could clear the officer of wrongdoing."[71] But even if the District Court was justified in casting Chavez's motivations in a dim light, his search for evidence to explain

---

[69] *Lewis v. State of California, supra*, 523 U.S. 833, quoting *Wolffe v. McDonnell*, 418 U.S. 539, 558 (1994).

[70] *Id.* at 849. *See also Collins v. Nuzzo*, 244 F.3d 246, 250 (1st Cir. 2001) ("[A]ction that is legally irrational in that it is not sufficiently keyed to any legitimate state interests," quoting *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28, 31-32 (1st Cir. 1991)).

[71] Order, *supra*, p. 13.

the shooting represented a legitimate state interest. Oddly, the District Court added that "although this information is not protected by the Fifth Amendment, Chavez's motivation was certainly not to assist plaintiff."[72] The recognition that the information was not protected by the Fifth Amendment is significant; but whether or not Chavez desired to "assist" plaintiff is not. This lack of assistance does not negate the legitimate state interest of getting to the bottom of the Martinez shooting.

It is surprising that, for summary adjudication purposes, the District Court offered an opinion about whether, subjectively, Chavez was pursuing a legitimate purpose in interviewing Martinez. For one thing, there was plenty of evidence that would support the opposite conclusion that Chavez intended to evaluate his subordinate officers' role in the shooting and preserve Martinez's recollection in the event of his death.[73] But more importantly, the District Court should have applied an *objective* standard. Recently, the California Supreme court considered, in a regulatory takings case, whether it should apply a subjective or objective standard to determine whether a governmental agency's actions "substantially advance[d] a legitimate state interest."[74] It held that "the proper inquiry is not into the subjective motive of the government agency, but whether there is, objectively, sufficient connection between the land use regulation in question and a legitimate governmental purpose so that the former may be said to substantially advance the

---

[72] *Id.*

[73] *See* Petitioner's Brief at Statement section.

[74] *Galland v. City of Clovis*, 24 Cal.4th 1003, 16 P.3d 130, 103 Cal.Rptr.2d 711 (2001).

latter."[75] That view is similar to this Court's holding in *Whren* that "subjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional . . . [T]he fact that the [law enforcement] officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action."[76]

Here there is ample evidence to conclude, on an *objective* standard, that Chavez interviewed Martinez, not in an arbitrary abuse of his authority as a law enforcement officer, but in the pursuit of a legitimate state interest. Thus, Chavez's conduct falls at the low end of the "arbitrariness" continuum.

Intent to Harm: In reviewing substantive due process claims, the courts have considered states of mind that range from "deliberate intent to harm physically or legally" to "negligence" – with "gross negligence" and "reckless disregard of life" somewhere inbetween. Chavez certainly acted in a deliberate manner in interrogating Chavez, but there is no evidence that he intended to *harm* Chavez. Again, Chavez's conduct falls at the low end of the continuum.

Time for deliberation: At one end of this continuum are high speed vehicle pursuits and other situations that require police officers to make "snap judgments;" on the other are circumstances where public officials have ample time to contemplate the likely consequences of their conduct. Prime

---

[75] *Id.* at 24 Cal.4th at 1035, 16 P.3d at 152, 103Cal.Rptr.2d at 735, n.6.

[76] *Whren v. United States*, 517 U.S. 806, 813 (1996), quoting *Scott v. United States*, 430 U.S. 128, 138 (1978).

examples of the latter are correctional officers who control the medical care of prisoners[77] or public employers who establish the work conditions of their employees.[78] Here, Chavez's opportunity to reflect on the consequences of this actions would fall towards the middle of this continuum. Certainly he reacted to events as they unfolded; but he was not faced with a split-second decision either.

Harm Inflicted: This continuum ranges from death to de minimus injuries.[79] Inbetween lie physical injury, seizure of property, and verbal harassment – although the latter is seldom the basis for liability. "[E]ven extreme verbal abuse typically is insufficient to establish a constitutional violation."[80] Here there is no evidence that Chavez harmed Martinez. As noted, the First Amended Complaint alleged that Chavez interfered with Martinez's medical care and treatment, but the District Court found that there was insufficient evidence to support this claim.[81] Substantive due process claims almost always result from *physical* abuse. None occurred here. And Marinez did not allege that he suffered any psychological damage from his interrogation. The Court of Appeal's speculation that a person in his position might "believe" that his statement would lead to prosecution hardly brings this case within the range of the

---

77 See *Bell v. Wolfish*, 441 U.S. 520 (1979).

78 See *Collins v. Harker Heights*, 503 U.S. 115 (1992).

79 See *Cruz-Erazo v. Rivera-Mantanez, supra*, 212 F.3d 617 and *Riley v. Darton*, 115 F.3d 1159 (6th Cir. 1996) for cases denying a substantive due process remedy for de minimus injuries.

80 *Abeyta v. Chama Valley Independent Sch. Dist.*, 77 F.3d 1253, 1256 (10th Cir. 1996).

81 Order, *supra*, p. 8.

"shock the conscience" or "deliberate indifference" standards. Thus, Chavez's conduct falls at the low end of the "harm inflicted" continuum.

Taken as a whole, the above factors argue that Chavez's conduct cannot possibly be viewed as "conscience shocking." However, Amici Curiae wish particularly to emphasize the legitimate state interest behind Chavez's interrogation of Martinez. That is because there are many situations in the law enforcement context where questioning a criminal suspect may serve important concerns other than – or in addition to – securing the conviction of the suspect. For instance, the elicited information may be used for:

- Protection of victims and witnesses;
- Law enforcement officer safety;
- Internal review for the purposes of discipline and development of policy;
- Identifying someone other than the suspect who perpetrated the crime;
- Exoneration of the suspect or others;
- Prevention of further crime by the interview subject, even at the expense of forfeiting the prosecution of the suspect – a factor involved in the *Cooper* interrogation;
- Preservation of the recollection of a suspect who is at the point of death, or may otherwise be unavailable, since there may not be a "second chance" to obtain that information; and

- National security.

One might question the legitimacy of one or another of these objectives, but by the same token, other valid concerns may be added to the list.

The reality of these concerns indicate that there is something terribly amiss in the Ninth Circuit Court of Appeals' approach to the Fifth and Fourteenth Amendments as applied to the interrogation of criminal suspects. One must ask, "what is wrong with a criminal justice system that protects a criminal suspect from self incrimination at trial, but permits government to elicit involuntary statements from him for other legitimate purposes?" The Ninth Circuit has not asked that question, and nothing it has said in *Cooper*, *Butts*, or *Martinez* satisfactorily answers it. That important question surfaces in the present case. Amici Curiae urge this court to answer that there is nothing wrong with such a system of justice; and to hold that the Fifth and Fourteenth Amendments are not violated at the time an involuntary statement is taken from a criminal suspect and that, unless an interrogation is truly "conscience shocking," there can be no substantive due process violation for eliciting an involuntary statement that serves some legitimate state purpose.

CONCLUSION

For the above reasons, Amici Curiae respectfully request the court to reverse the judgment of the Court of Appeal.

Respectfully submitted,

September 5, 2002

GIRARD FISHER*
POLLAK, VIDA & FISHER
1801 Century Park East
26th Floor
Los Angeles, CA 90067
(310) 551-3400
*Counsel of Record

APPENDIX "A"

How The Federal Courts Stand On The Fifth And Fourteenth Amendment Protections

1 = United States Supreme Court
2 = 3rd, 4th, 8th, 10th, 11th Circuits
3 = 2nd Circuit
4 = 9th Circuit

(Increasing Police Pressure) →

Issues	Courts	Failure to Mirandize	Compelled Statement	Coerced Statement	Shocks the Conscience
Introduction of statement in case in chief violates 5th	1 thru 4	YES	YES	YES	YES
Introduction as impeachment violates 14th	1 thru 4	NO	NO	YES	YES
Compulsion a per se violation of 5th	1 thru 3 4	NO **YES**	NO **YES**	NO **YES**	NO **YES**
Coercion a per se violation of 14th	1 and 2 3 and 4	NO NO	NO NO	NO **YES**	YES **YES**